Filed 3/1/10 P. v. Arguelles CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ARGUELLES, Defendant and Appellant.	2d Crim. No. B217324 (Super. Ct. No. F429684) (San Luis Obispo County)

Robert Arguelles appeals from the judgment entered following a court trial at which he was determined to be a mentally disordered offender (MDO). (Pen. Code, § 2960 et seq.)[1] Appellant asserts that the evidence does not support the finding that the commitment offenses, vandalism and carrying a concealed weapon, involved the use of force or violence or an express or implied threat thereof within the meaning of section 2962, subdivision (e)(2)(P) or (e)(2)(Q). We affirm.

Facts and Procedural History

In 2006, appellant was convicted of vandalism (§ 594, subd. (b)(1)) and carrying a concealed weapon (§ 12020, subd. (a)) and sentenced to two years state prison. After the Board of Prison Terms found that appellant met the MDO criteria for psychiatric treatment, appellant petitioned the superior court for review and waived jury trial. (§ 2966, subd. (b).)

[1] All statutory references are to the Penal Code.

Doctor John F. Eibl, a forensic/clinical psychologist at Atascadero State Hospital, testified that appellant suffered from a severe mental disorder, schizophrenia (paranoid type), and polysubstance dependency and acute Hepatitis C. The severe mental disorder was manifested by delusional beliefs that the police were conspiring against appellant, that appellant's children were being killed, and that "gang stalkers" were using computers to harass appellant and induce him to commit suicide. Appellant believed that police officers, politicians and the Mafia had committed murders and were conspiring with President Bush's family to steal money through a housing loan fraud.

Doctor Eibl opined that the commitment offense, which involved two incidents, was a qualifying offense under the MDO statute. (§ 2962, subd. (e).) The first incident occurred August 8, 2005. Appellant reported that a woman had been stuck in a tree for two days and called the fire department. Angry, appellant smashed car windows and slashed car tires at his apartment complex. He was convicted of felony vandalism. (§ 594, subd. (b)(1).)

The second incident occurred September 14, 2005. Appellant telepathically communicated with his daughter and believed that she was about to be "raped and killed." Armed with a butcher knife, appellant drove around looking for persons he perceived were harming his daughter. Appellant was convicted of carrying a concealed weapon. (§ 12020, subd. (a).)

Doctor Eibl opined that the commitment offense was caused or aggravated by the severe mental disorder and that appellant met all the MDO criteria. Because the mental disorder was not in remission, appellant would more than likely exhibit lability, anger, disorganized thinking and erratic behavior and would be a danger of physical harm to others.

Threat of Force or Violence

Appellant argues that vandalism and carrying a concealed weapon are not crimes of force or violence within the meaning of 2962. To qualify as a commitment offense, the crime must be either listed in section 2962, subdivision (e)(2)A) through (O), or

come within the catchall provisions of subdivision (e)(2)(P) or (e)(2)(Q). (*People v. Kortesmaki* (2007) 156 Cal.App.4th 922, 926.) Subdivision (e)(2)(P) includes any crime "not enumerated . . . in which the prisoner used force or violence, or caused serious injury. . . ." Subdivision (e)(2)(Q) includes any crime in which the "perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury."

"We have previously held that a qualified mental health professional may render an opinion on the force or violence criterion and may rely on the probation report from the underlying case in formulating that opinion. [Citations.]" (*People v. Martin* (2005) 127 Cal.App.4th 970, 976.)

Vandalism

Citing *People v. Green* (2006) 142 Cal.App.4th 907 (*Green*), appellant argues that vandalism is not a crime of force or violence within the meaning of the MDO statute. In *Green*, a storeowner called the police because defendant was loitering. After the police placed defendant in a patrol car, defendant kicked out the car rear window. Defendant pled guilty to felony vandalism and the more egregious charges (criminal threats on the storeowner and unlawful obstruction of a peace officer) were dismissed and irrelevant to the determination of whether the commitment offense qualified under the MDO statute. (*Id*., at p. 913.) We held that "the application of force against an inanimate object does not fall within section 2962, subdivision (e)(2)(P.)." (*Ibid.*)

Like *Green*, there is no evidence that appellant used force or violence against anyone in vandalizing the cars.[2] The Attorney General speculates that persons may have been in or near the vehicles, but the record is silent on this point. Doctor Eibl testified there no verbal threats to injure anyone.

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[2] The Chief Psychiatrist of the Department of Corrections and Rehabilitation listed the vandalism offense as a "noncontrolling" offense in the MDO certification.

Threats with a Butcher Knife

The concealed weapon offense was much different and involved an implied threat to harm others with force or violence. Armed with a butcher knife, appellant drove around looking for persons he believed were about to rape and kill his daughter. Appellant said that he was going to "break that up," which a reasonable trier of fact could infer was an implied threat to use force or violence against persons who might harm appellant's daughter. (§ 2962, subd. (c)(e)(Q).)

In *People v. Kortesmaki* (2007) 156 Cal.App.4th 922, defendant was convicted of possessing flammable or combustible materials with intent to set fire to a dumpster (§ 453, subd. (a)). Before lighting the fire, defendant approached two men outside a liquor store and "asked if they would mind if he started a fire 'back there,' pointing towards the dumpster area." (*Id*., at p. 925.) As defendant walked to the dumpster carrying a whiskey bottle filled with liquid, the men went inside the store and notified the store clerk. (*Ibid.*)

Citing *Green*, we held that section 2962 subdivision (e)(2)(P) did not apply because there was no evidence that defendant used force or violence against anyone. (*Id*., at p. 928.) We, however, concluded there was sufficient evidence "to sustain a finding that [defendant's] commitment offense qualifies as a crime involving an implied threat to use force or violence likely to produce substantial physical harm, as contemplated by section 2962, subdivision (e)(2)(Q). [Defendant] approached two men with a bottle of flammable liquid in his hand and told them that he was going to set fire to a dumpster that was backed against the wall of the store they were about to enter. The men apparently took the threat seriously, as evidenced by the fact that they immediately conveyed it to the store clerk." (*Id*., at p. 928, fn. omitted.)

The same principle applies here. Appellant asserts that he possessed the butcher knife "entirely for defensive purposes" but it is uncontroverted that he was looking for persons he perceived would harm his daughter. Appellant believed the police had committed murders and were conspiring against him, and said that he "was going to break

that up . . . ." Doctor Eibl testified that appellant had a butcher knife and "circled the police" with his van before he was arrested. A reasonable trier of fact could find that it was an implied threat to cause substantial harm to others, i.e., the police. (§ 2962, subd. (e)(2)(Q).) Like *People v. Kortesmaki*, *supra*, there is no requirement that the defendant identify the threatened victim by name.

Appellant's reliance on *People v. Anzalone* (1999) 19 Cal.4th 1074 is misplaced and predates the amendment of section 2962 which added subdivision (e)(2)(Q). "The amendment of section 2962 was designed to prevent the release of MDO's on the sole ground that their crimes involved the threat of force rather than actual force." (*People v. Butler* (1999) 74 Cal.App.4th 557, 561.)

Substantial evidence supports the trial court's finding that appellant, in arming himself with a butcher knife and actively looking for persons who might harm his daughter, threatened to use force or violence against another within the meaning of section 2962, subdivision (e)(2)(Q). "The purpose underlying the MDO law is to protect the public by identifying those offenders who exhibit violence in their behavior and pose a danger to society." (*People v. Dyer* (2002) 95 Cal.App.4th 448, 455.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Hugh Mullin, Judge

Superior Court County of San Luis Obispo

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Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Tasha G. Timbadia, Deputy Attorney General, for Plaintiff and Respondent.